

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S  
PETITION FOR  
REHEARING  
EN BANC**





[CORRECTED COPY]

**77-1107**

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 77-1107**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

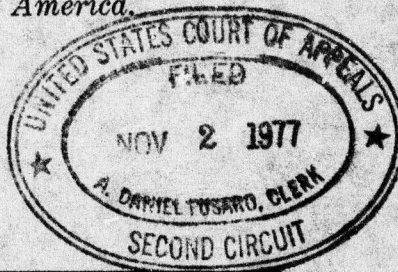
WILLIAM CLEARY and GUSTAVO PASSARELLI,  
*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**PETITION OF THE  
UNITED STATES OF AMERICA FOR REHEARING**

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 77-1107

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

WILLIAM CLEARY and GUSTAVO PASSARELLI,  
*Defendants-Appellants.*

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### PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING

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#### Preliminary Statement

The United States of America respectfully petitions for rehearing of the opinion of a panel of this Court (Van Graafeiland, J., Webster, J., of the Eighth Circuit sitting by designation, Dooling, D.J., of the Eastern District of New York sitting by designation) filed October 20, 1977, reversing and remanding for a new trial the convictions of William Cleary on all counts and of Gustavo Passarelli on two counts of Indictment 76 Cr. 986,\* on the ground that combined errors in the exclusion of evidence and in the charge prejudiced defendant Cleary. *United States v. Cleary*, Dkt. No. 77-1107, slip op. 6329 (2d Cir. Oct. 20, 1977).

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\* The four substantive counts on which Cleary was convicted involved loans in the name of Joseph Passarelli—Gustavo Passarelli's brother—(Count Six), Thomas Power (Count Seven), Westchester Avenue Used Cars (Count Eight), and Edward Hogan (Count Fourteen). Gustavo Passarelli was also convicted on Counts Seven and Eight, but his convictions were reversed because an aider and abettor can only be convicted if the principal is found guilty. Passarelli's conviction on the other counts were affirmed.

### Reasons For This Petition

The Government submits that the panel's decision in this case should be reconsidered because it manifests a basic misunderstanding of the record and finds reversible error in the exclusion of evidence that had nothing to do with the essential defense presented by Cleary and was never raised by Cleary as an issue on appeal. The Court characterized as error prejudicial to Cleary, the exclusion of evidence relating to offers to repay the proceeds of the loans by some of the named borrowers associated with Passarelli. Cleary, however, never sought to elicit this evidence at trial, never complained when the District Court excluded it on the sole proffers of his co-defendant, and never sought review of this ruling on appeal. In overlooking these plain facts the Court's opinion not only substitutes its own theory of the defense for that of the defendant, but *a fortiori* violates a cardinal rule of appellate review: in the absence of plain error, a reviewing court will not find reversible error when the complaining defendant failed to make an appropriate objection or offer of proof at trial.\*

Furthermore, the Court aggravated its mistaken view of the record by tying the exclusion of evidence to a claimed defect in the District Court's charge, the *combined* effect of which the panel concludes required reversal. If this Court properly had understood that the exclusion of the Passarelli evidence had nothing to do with Cleary, we submit that the charge, which unambiguously and

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\* Cases standing for this proposition are numerous: *United States v. Martinez-Carcano*, 557 F.2d 967 (2d Cir. 1977); *United States v. Fury*, 554 F.2d 522, 527 (2d Cir. 1977); *United States v. Araujo*, 539 F.2d 287, 291 (2d Cir. 1976); *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976); *United States v. Bianco*, 534 F.2d 501, 507 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Projansky*, 465 F.2d 123, 135 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).



repeatedly reminded the jury that an essential element of bank misapplication was an intent to injure or defraud the bank, would not have been considered error, and certainly not sufficient by itself to have required reversal. Indeed, the panel found fault with language in the charge that was based entirely on a prior opinion of this Court, *see, United States v. Giordano*, 489 F.2d 327 (2d Cir. 1973), and, in so doing, failed to credit the charge as a whole, in contravention of the well-settled rule of this and other Courts.

The Government seeks rehearing not simply because a criminal conviction has been reversed and the Government will have to undertake the burden of retrying both Cleary and Passarelli. Rather, we respectfully submit that the panel's opinion, in its dramatic misperception of this case based upon an unfortunate inclination to substitute its own view of the evidence for that of the jury, creates a harmful and confusing precedent that should not be permitted to stand.

## ARGUMENT

### POINT I

#### **Cleary Never Attempted to Elicit the Testimony the Panel Finds Was Improperly Excluded, and that Evidence Was Totally Irrelevant To Cleary's Defense.**

Since the panel's finding of reversible error proceeds in the first instance upon a characterization of the case against Cleary as a "close one," it bears initial emphasis that the evidence against Cleary was far stronger than the Court suggests.\* The Government proved that Cleary repeatedly approved improper loans which he knew disguised the identity of the true borrower, Gustavo Pas-

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\* The Government will not detail all of its arguments relating to Cleary's guilt; we refer the Court to the statement of facts in our main brief, and pages 20 through 26 of our argument on the sufficiency of the evidence as to Cleary.

sarelli, a former bank customer, to whom Cleary knew his bank had decided not to extend any additional loans. All of these loan applications, as well as certain others, were brought to Cleary by co-defendant Jerome Healy. In flagrant violation of bank regulations, Cleary approved the applications even though he was advised that the money was *not* intended for the named borrower, he never met the borrowers, knew nothing about them except what Healy might have said, and even though Cleary knew that Healy was not reliable. Cleary also knowingly granted several of the loans in the names of nominees so that the true loan recipients could receive sums in excess of Cleary's \$5,000 lending authority.

Cleary testified that he approved these loans, but claimed to have done so entirely on his trust of Healy. While Cleary's testimony differed in certain material respects from Healy's, in light of the circumstantial evidence as to the unorthodox nature of these transactions, it was not surprising that the jury concluded that Cleary knew that the intermediate borrowers were strawmen, that the bank would have to look to Passarelli for repayment, and that it was improper to lend the money to Passarelli.\*

Moreover, while the jury acquitted Cleary of the substantive charges relating to loans prior to the one to Joseph Passarelli, it found him guilty of that loan and those which Cleary subsequently approved; thereby clearly finding that as of the time of the Joseph Passarelli loan, Cleary intended to injure and defraud the bank.\*\* Thus, the jury's discriminating verdict alone should provide this Court with sufficient confidence in the ability of the jury to convict Cleary when his guilt was estab-

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\* Judge Carter fully instructed the jury that a loan was not a wilful misapplication where the named debtor is financially capable and understands his responsibility to repay the loan, even if the bank officials knew the funds would be furnished to a third-party—here Passarelli (Tr. 882-83).

\*\* See Government's Main Brief at 22.



lished beyond a reasonable doubt, and acquit him if the Government failed to meet that heavy burden.

The panel's opinion implicitly evidencing an unwarranted distrust in the jury's view of the evidence,\* held that Cleary was prejudiced by the trial court's refusal to allow *Passarelli's* counsel to elicit testimony about Joseph Passarelli's unsuccessful efforts to repay the loan in his name. A review of the trial transcript shows quite clearly that the defendant Cleary never protested Judge Carter's decision to preclude his co-defendant from offering proof relating to the named borrowers offer to repay the loans in the Passarelli phase of the case. At no time did Cleary's attorney ever endeavor to elicit testimony regarding the efforts of the named borrowers in the Passarelli phase of the case to repay the loans.\*\* Indeed, each of the named borrowers or strawmen in whose name the Passarelli loans were approved testified at the trial. Cleary never asked any of these witnesses if they had attempted to repay the loans. Cleary never evidenced any desire to pursue that line of questioning. In fact, Cleary asked no questions of any of these witnesses. (Tr. 284, 311, 376, 395, 626). Cleary, in sum, never placed Judge Carter on notice that he believed such testimony was relevant to his defense.

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\* The wisdom of Chief Judge Kaufman's opinion in *United States v. Birnbaum*, 373 F.2d 250, 257 (2d Cir. 1967) is particularly instructive:

"Our legal system leaves the awesome question of guilt for the jury, with the prosecution assuming the proportionately difficult burden of persuading a jury of twelve that the defendant is guilty beyond a reasonable doubt. When, as in the present case, the evidence is sufficient to warrant submission to the trial jury, we must take care not to sit as a 'super jury' reevaluating credibility or reweighing the evidence."

See also *United States v. Sears*, 544 F.2d 545, 586 (2d Cir. 1976) where Judge Van Graafeiland observed that this Court "may not substitute (its) own view of the evidence for that of the jury."

\*\* The Government invites the Court to review the official transcript at pages 64 through 75. In these pages Passarelli's counsel is rebuffed in his effort to elicit testimony about efforts to repay the loans.

In such circumstances, had Cleary raised this contention on appeal for the first time, this Court would have been fully justified in refusing to consider it on the ground of waiver. See, *United States v. Braunig*, 553 F.2d 777 (2d Cir. 1977), and cases cited therein. The panel's failure to find a waiver is amazing in view of the fact that Cleary did not even raise the issue on appeal, a decision by him which reconfirms the fact that he never considered this evidence to be of any significance to his case.

The panel's decision, finding error in the exclusion of evidence never offered by Cleary and never claimed to require reversal by this defendant on appeal, is wholly incomprehensible for yet another reason. In a separate phase of the case—those loans involving Cleary and Healy alone, but not Passarelli—Cleary elicited without objection the very evidence that this Court held was excluded prejudicially against him, and yet never chose to make any argument to the jury on this basis. Thus, with respect to the loans to Richard Fletcher and Edward Hogan—in which Passarelli had no part—Cleary elicited that the Fletcher loan had been repaid and that Hogan intended to make repayment. (Tr. 317(a)-318, 271-72). These facts—totally overlooked by the panel's opinion—are significant for two reasons. First, Cleary's unfettered ability to elicit proof of offers to repay with Fletcher and Hogan makes manifest defendant's conscious tactical decision to remain silent when such evidence was proffered in connection with the Passarelli loans.\* Second, and

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\* The record makes clear that when Cleary believed such questions dealing with repayment were at all helpful to him, he knew how to and did elicit such evidence. Cleary's silence in the face of Passarelli's proffer can only be explained as a deliberate tactical decision by Cleary to separate himself from Passarelli, who originally had the greatest motive to defraud the bank. This decision was dictated by Cleary's defense which sought to portray him as an innocent bank officer who was duped by the attorney Healy. In the face of that tactical decision, Cleary's counsel properly never sought to mislead this Court on appeal by claiming, after-the-fact, that he had in some way joined the exception to

[Footnote continued on following page]



more basically, Cleary made no argument to the jury on the issue of repayment in his summation, notwithstanding that there was evidence of the offers to repay in the record.\*

The reason that Cleary did not seek to make this argument to the jury was obvious, and points up the essential flaw in this Court's opinion. Cleary's defense exclusively turned on his reliance on Healy, a matter which simply had nothing to do with the named borrowers since Cleary never had spoken with them. Had Cleary's counsel argued to the jury that the actual repayment, or offers to repay, were important, he would have committed a fatal tactical error, opening the door to the fact that in most of the cases no repayment was made, thus pointing up the very defects in Cleary's original handling of these loans. Accordingly, the panel's logic is simply beguiling in the suggestion that proof of offers to repay was a part of Cleary's defense. It had nothing to do with the defense strategy of Cleary which was simply that Cleary had relied in good faith on Jerome Healy.\*\*

Finally, the unfortunate infirmity of the panel's opinion is best made clear by the fact that the very evidence which the panel suggests might have altered the jury's view of the case, was before the jury on the Hogan loan, of which Cleary was convicted. We submit that on the

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Judge Carter's exclusion of the offers to repay the Passarelli loans. Nevertheless, this Court overlooked defense counsel's good faith and on its own extraordinarily attributed an implicit exception to Cleary when none was taken.

\* Indeed, there was evidence in the record of Passarelli's offer to repay as well, and this evidence was never argued to the jury by either Cleary or Passarelli. See, Government's Main Brief at 37-38.

\*\* In the fact of this jury's discriminating verdicts, based solely on its intelligent and careful review of the evidence, it cannot be claimed that Cleary's conviction on the Hogan loan resulted from a spill-over effect. Indeed, Cleary was *acquitted* by the jury on the Fletcher loan, which was one of the only loans repaid in full, a result that is simply inconsistent with any finding of spillover.



very reasoning of the panel's opinion, Cleary's conviction on Count 14, at a minimum, should have been and must be affirmed.

## POINT II

### The District Court's Charge Was Entirely Proper.

The panel based its decision to reverse on the combined effect of the exclusion of evidence relating to offers to repay and a portion of the trial court's charge on intent,\* that, according to the Court, in other circumstances would have been clearly correct and proper. Since the treatment of the charge was dictated completely by the Court's erroneous view of the excluded evidence, it is clear that this aspect of the panel's decision, as well, does not withstand analysis. Moreover, in criticizing language the precise substance of which previously has been approved by this Court, *United States v. Giordano*, 489 F.2d 327 (2d Cir. 1973), the panel's opinion creates an inconsistent and harmful precedent based upon a refusal to review the charge as a whole.\*\*

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\* The opinion, slip op. at 6335, refers to that portion of the charge in which Judge Carter instructed the jury that: "Even if it was not Mr. Cleary's purpose to injure or defraud Barclay's Bank, if he knew that the natural effect of his actions would be to expose the bank to loss, injury or fraud, the requisite intent is established." (Tr. 884).

Although it is somewhat difficult to determine, the Court's opinion appears also to find some problem in Judge Carter's charge that it was immaterial whether the Bank suffered a loss. However, no objection was taken to this aspect of the charge, and as the Court's opinion recognizes, it fully comports with established law.

To the extent that this aspect of the opinion suggests that the jury should have been instructed to consider actual repayments on the issue of intent, this view again overlooks the fact that Cleary never attempted to develop a defense based on actual payments. Given the fact that such a defense left him vulnerable where, as in almost all cases, no repayments were made, he chose instead to rest his case on his reliance on Healy's representations.

\*\* The Government of course adheres to the position advanced in its main brief at pages 29-31 that the charge as a whole clearly

[Footnote continued on following page]

As we have made clear in Point I, *supra*, the limited offers to repay the loans simply had nothing to do with Cleary's defense. Instead, Cleary argued that the absence of his intent to defraud the bank was demonstrated exclusively by his purported good faith reliance on Healy's representations. The cited language of Judge Carter's instructions to the jury did not foreclose resolution of Cleary's defense in his favor: if, as Cleary, claimed, he had relied in good faith on Healy's representations then he would not have known "that the natural effect of his actions would be to expose the bank to loss, injury or fraud . . . .;" conversely, if the jury found that Cleary had not in good faith, relied on Healy, then defendant's intent would have been established. In the context of this case and the defense advanced by Cleary, this proper analysis of the issues was open to the jury on the basis of Judge Carter's charge.

Finally, as previously noted in our main brief at 31-32, the District Court's explanatory language simply informed the jury that Cleary's *motive*—as oposed to his intent—need not have been to injure or defraud the bank, and did not shift the jury's focus away from the significant issue of Cleary's intent. Judge Carter's charge fairly and fully apprised the jury of this issue, and his charge is consistent with this Court's opinion in *Giordano* and the cases quoted therein. *United States v. Giordano*, *supra*, 489 F.2d at 333 (quotations from *Golden v. United*

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informed the jury that the Government had to prove beyond a reasonable doubt that Cleary acted with the intent to injure or defraud the bank. On three occasions during the charge Judge Carter repeated that admonition. (Tr. 881, 883). This Court's decision holding that certain language in the instructions constituted reversible error simply fails to view the charge in its entirety, and thus violates a basic principle of appellate review. This Court has repeatedly held that the charge must be read as a whole. *United States v. Hanlon*, 548 F.2d 1096 (2d Cir. 1977); *United States v. Guillette*, 547 F.2d 743, 750 (2d Cir. 1976); *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976).



*States*, 318 F.2d 357, 361 (1st Cir. 1963); *Galbreath v. United States*, 257 F. 648, 656 (6th Cir. 1918).\*

### CONCLUSION

**The petition for rehearing should be granted and the judgments of conviction affirmed.**

Respectfully submitted,

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 ROBERT JOSSEN,  
 AUDREY STRAUSS,  
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\* In *United States v. Giordano* the District Court failed to instruct the jury that an element of the offense of bank misapplication was an intent to injure or defraud the bank. Instead the District Court stated that element in the following language: the defendant "knew that such application of the bank funds exposed it to the risk of losing the funds so applied and concealed the existence of the transaction . . ." This Court unanimously upheld that charge because "the element of intent in the wilful misapplication of funds is satisfied by proving that the natural result of the unlawful act is likely to injure the bank . . ." *United States v. Giordano*, *supra*, 489 F. 2d at 333.

In the instant case Judge Carter told the jury three times that it must find beyond a reasonable doubt that the defendant's intent was to injure or defraud the bank. (Tr. 881, 883). He accurately explained these terms to mean that the acts were done with "the specific intent to deceive or cheat, for the purpose of either causing financial loss to another, or bringing about some financial gain to one's self." (Tr. 883). Finally, in language closely paralleling the language quoted above from this Court's opinion in *Giordano*, and explicitly approved in that opinion, Judge Carter explained that even if Cleary's purpose was not to injure or defraud the bank, the requisite intent exists "if he knew that the natural effect of his actions would be to expose the bank to loss, injury or fraud . . ." (Tr. 884).





AFFIDAVIT OF MAILING

STATE OF NEW YORK     )  
                                  :   ss.:  
COUNTY OF NEW YORK    )

Lawrence Taron being duly sworn,  
deposes and says that he is employed in the office  
of the United States Attorney for the Southern District  
of New York.

That on the 2nd day of November 1977  
he served a copy of the within Petition for Rehearing  
by placing the same in a properly postpaid franked  
envelope addressed:

Desirel Murphy, Esq.  
140nd & Mount  
3 Park Avenue  
New York, NY

Martin Berger, Esq.  
13 Eastbourne Drive  
Spring Valley, NY

An deponent further says that he sealed the said  
envelope and placed the same in the mail chute drop for  
mailing at One St. Andrew's Plaza, Borough of Manhattan,  
City of New York.

Lawrence Taron

Sworn to before me this

2nd day of November 1977

Gloria Meyer

GLORIA MEYER  
Notary Public, State of New York  
No. 31-0535340  
Qualified in New York County  
Commission Expires March 30, 1979







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